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LeRoy S. Rooker
U.S. Department of Education
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Washington, DC 20202-5920

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Dear Mr. Rooker:

The National School Boards Association, (NSBA) representing 95,000 public school board members in 15,000 school districts, offers the following comments to the proposed rules on the Family Educational Rights and Privacy Act (FERPA). NSBA asks the Department of Education to consider NSBA's comments carefully as NSBA represents the approximately 15,000 public elementary and secondary schools in the United States. Our comments were prepared with the assistance of the Council of School Attorneys, a 3,000-member organization of attorneys who represent school districts. NSBA also asks the Department to list in the final regulations any opinion letters or other guidance that are superseded by the final regulations.

1. Definitions § 99.3

Attendance (page 15,575)

FERPA does not define attendance. The current regulations define attendance as attendance in person or by correspondence, and the period during which a person is working under a work-study program. The proposed regulations add attendance by

videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom.

NSBA comments: NSBA supports this change. NSBA believes that the proposed language encompasses all of the distance learning relationships school districts currently have with students. If the Department of Education is concerned about the making sure its definition of “attendance” stands the test of time as technology changes, it could also define “attendance” in terms of receiving instruction leading towards a diploma or certificate rather than in terms of the format in which the education is received (in person versus via technology).

Directory information (page 15,575-76)

Current regulations do not specify whether a student’s Social Security Number (SSN), official student identification (ID) number, or personal identifier for use in electronic systems may be designated and disclosed as directory information. The proposed regulations would provide that a school district may not designate as directory information a student’s SSN or other student ID number. However, directory information may include a student’s user ID or other unique identifier used by the student to access or communicate in electronic systems, but only if the electronic identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the student’s identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the student.

NSBA comments: First, NSBA supports the exclusion of SSNs and student ID numbers from directory data because as the Department mentions, this information in combination with other information can be used for identity theft.

Second, regarding whether a student’s user ID or other unique identifier should be included in directory data in certain circumstances, the Department provides some examples of instances school districts “may need to publish or disclose a student’s unique electronic identifier.” NSBA asks the Department to provide additional easy-to-understand examples of instances in which a student’s user ID or other unique identifier might need to be publically available. For example, if a student named Bill Smith were to participate in an online chat about a science project with his fellow classmates, likely all his classmates would know that when “bsmith” participated in the chat Bill Smith’s username is bsmith.

If the Department finalizes this change as proposed, it might be clearer if the definition’s subsection (b) signals the exception under subsection (c) for when a student ID number can, in fact, be directory information.

Disclosure (page 15,576)

The proposed regulations would exclude from the definition of disclosure the release or return of an education record, or personally identifiable information from an education record, to the party identified as the party that provided or created the record. This would allow, for example, School B to send a transcript, letter of recommendation, or other record that appears to have been falsified back to School A, the institution or school official identified as the creator or sender of the record, for confirmation of its status as an authentic record. School A may confirm or deny that the record is accurate and send the correct version back to School B. The proposed regulations would also permit a State or local educational authority or other entity to redisclose education records or personally identifiable information from education records, without consent, to the school district, institution, or other party that provided the records or information.

NSBA comments: NSBA supports this change. As the Department mentions, school districts often receive records that appear to be falsified. For this reason, districts appreciate the flexibility of being able to directly contact the creator of the record to verify its veracity.

Education Records (page 15,576)

The proposed regulations would clarify that, with respect to former students, the term *education records* excludes records that are created or received by the educational agency or institution after an individual is no longer a student in attendance and are not directly related to the individual's attendance as a student.

According to ED, there has been some confusion about the provision in the definition of education records that excludes certain alumni records. Some schools have mistakenly interpreted this provision to mean that any record created or received after a student is no longer enrolled is not an education record under FERPA. The proposed regulations are needed to clarify that the exclusion is intended to cover records that concern an individual or events that occur after the individual is no longer a student in attendance, such as alumni activities. The exclusion is *not* intended to cover records that are created and matters that occur after an individual is no longer in attendance but that are directly related to his or her previous attendance as a student, such as a settlement agreement that concerns matters that arose while the individual was in attendance as a student.

NSBA comments: NSBA supports this clarification.

Peer Grading § 99.3 (page 15,576)

The proposed regulations would clarify that peer-graded papers that have not been collected and recorded by a teacher are not considered maintained by an educational agency or institution and, therefore, are not education records under FERPA.

NSBA comments: NSBA supports this change as it follows the Supreme Court's holding in Owasso Independent School District No. I-011 v. Falvo, 534 U.S. 426 (2002).

Likewise, NSBA seeks clarification that other classroom work, in addition to peer-graded papers, that also has not been collected and recorded is not an educational record under FERPA. For example, students may work on projects jointly, may post their work on class bulletin boards, may work on projects on computers that the teacher and other students may comment on or edit, or may exchange and comment on drafts of assignments. Practically speaking, most teachers are not treating the above items as education records because doing so would stifle an open and meaningful exchange of ideas in the classroom. Therefore, NSBA seeks clarification that classroom activities other than peer-graded assignments that have not been collected or recorded are not education records.

NSBA suggests the following language to address the issue NSBA discussed above: § 99.3 (b)(b) Grades on peer-graded papers and comments or grades on student work before they are collected and recorded by the teacher.

Personally Identifiable Information (page 15,577)

FERPA provide that an educational agency or institution may not have a policy or practice of permitting the release of or providing access to education records or any personally identifiable information other than directory information in education records without prior written consent except in accordance with statutory exceptions. The term personally identifiable information is defined in the current regulations to include the student's name and other personal identifiers, such as the student's social security number or student number. Current regulations also include indirect identifiers, such as the name of the student's parent or other family members; the address of the student or the student's family; and personal characteristics or other information that would make the student's identity easily traceable.

The proposed regulations would add biometric record to the list of personal identifiers and add other indirect identifiers, such as date and place of birth and mother's maiden name, to the list of personally identifiable information. The regulations would remove language about personal characteristics and other information that would make the student's identity easily traceable and provide instead that personally identifiable information includes other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. Personally identifiable information would also include information requested by a person who the educational agency or institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates.

NSBA thoughts: NSBA supports adding other indirect identifiers such as the student's date of birth, place of birth, and mother's maiden name to the list of personally identifiable information as this information can be used in identity theft. However, this change may be confusing to the extent that it does not appear to list all the possible

indirect modifiers that are personally identifiable information. A comprehensive list of indirect identifiers would be helpful to school districts.

NSBA also asks that the Department define “biometric record.”

[Note: NSBA responds to the following new requirements in item 4 below: (1) that personally identifiable information includes other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty is discussed at item; and (2) personally identifiable information would also include information requested by a person who the educational agency or institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates.]

2. Disclosures to Parents of Eligible Students §§ 99.5, 99.36 (pages 15,577-78)

The proposed regulations clarify that even after a student has become an eligible student, an educational agency or institution may disclose education records to the student's parents, without the consent of the eligible student, if the student is a dependent for Federal income tax purposes; in connection with a health or safety emergency; if the student is under the age of 21 and has violated an institutional rule or policy governing the use or possession of alcohol or a controlled substance; and if the disclosure falls within any other exception to the consent requirement in the regulations, such as the disclosure of directory information or in compliance with a court order or lawfully issued subpoena. The proposed regulations clarify that an eligible student's parents are appropriate parties to whom an educational agency or institution may disclose personally identifiable information from education records without consent in a health or safety emergency.

NSBA comments: NSBA supports the above clarifications. The clarification that if students are 18 or over that an eligible student's parents are appropriate parties to whom a school district may disclose personally identifiable information from education records without consent in a health or safety emergency is particularly helpful in light of the confusion illuminated following the Virginia Tech shootings.

However, NSBA questions whether asking parents to provide a copy of their most recent tax return to prove a student is dependant is a good policy. Tax returns contain a lot of personal information including the parents' social security numbers and income. Perhaps a query is sufficient or the district could ask to see a copy of the tax return but does not have to keep a copy.

NSBA also seeks clarification that FERPA rights are transferred to a student who has been emancipated under state law.

3. Authorized Disclosure of Education Records Without Prior Written Consent § 99.31(a)(1)

School Officials Outsourcing § 99.31(a)(1) (pages 15,578-80)

FERPA defines education records to include records maintained by an educational agency or institution or by “a person acting for” the agency or institution. An educational agency or institution may allow teachers and other school officials within the institution or agency, without prior written consent, to obtain access to education records if the institution or agency has determined that they have legitimate educational interests in the information.

The proposed regulations would expand the school official exception to include contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions that it would otherwise use employees to perform. The outside party who obtains access to education records without consent must be under the direct control of the agency or institution and subject to the same conditions governing the use and redisclosure of education records that apply to other school officials.

Educational agencies and institutions that outsource institutional services and functions must comply with the annual FERPA notification requirements by specifying their contractors, consultants, and volunteers as school officials retained to provide various institutional services and functions. Educational agencies and institutions are responsible for their outside service providers' failures to comply with applicable FERPA requirements. All outside parties serving as school officials are subject to FERPA's restrictions on the use and redisclosure of personally identifiable information from education records. These restrictions include the requirement that an educational agency or institution that discloses personally identifiable information from education records to do so only on the condition that the recipient will use the information only for the purpose for which the disclosure was made and will not redisclose the information to any other party without the prior consent of the parent or eligible student unless the educational agency or institution has authorized the redisclosure under a FERPA exception and the agency or institution records the subsequent disclosure.

NSBA comments: NSBA supports this change. School districts frequently outsource functions employees would normally perform – for example using outside legal counsel. Often those in outsourced roles have a legitimate educational interest in student records and need to review such records to effectively perform their job.

NSBA seeks further clarification that “direct control” is to be broadly construed. For example, a school district would have direct control over outside legal counsel for the purposes of this regulation because the school district could always terminate its relationship with outside counsel if it was dissatisfied with the legal representation it was providing. However, outside counsel does not work on the school district premises and the school district does not control how outside legal counsel performs its work.

Access to Education Records by School Officials (page 15,580-81)

The proposed regulations would require an educational agency or institution to use reasonable methods to ensure that teachers and other school officials obtain access to only those education records in which they have legitimate educational interests. This requirement would apply to education records maintained in either paper or electronic format. Agencies and institutions that choose not to use physical or technological controls to restrict a school official's access to education records must ensure that their administrative policy for controlling access to and maintenance of education records is effective and that the agency or institution remains in compliance with the legitimate educational interests requirement.

NSBA comments: NSBA does not support this change. This new requirement is an additional burden on school districts which is probably unnecessary. In general, school districts are aware of their obligation to allow staff with a legitimate education interest only to view education records and do their best to comply with the law.

However, to the extent that this proposed change becomes final, NSBA supports the Department's proposal that technological controls not be mandatory due to the expense of using them and the fact that using technological controls may not work well in many instances. Take for example the records of a special education student. Between meetings, evaluations, and individual education plans, most special education students have countless records. Numerous and ever-changing school employees from data operators, to teachers, to therapists will make need to review, modify, and create records for each student. It is difficult to envision a system of technological controls flexible enough to grant the right people access at all times to records in this instance.

Furthermore, to the extent that this proposed change becomes final, NSBA supports the use of effective administrative controls determined by the school district based on its resources and knowledge of what is likely to work at the district. NSBA does not think that requiring school districts to implement a sliding scale of methods of controlling data "commensurate with the likely threat and potential harm" is realistic. School districts receive numerous demands for records each day. It would be impossible for school districts to categorize all data ahead of time by level of risk, particularly in light of the fact that certain data might be more at risk in certain people's hands. A requirement that districts use effective administrative controls as determined by the district to make sure data is only viewed by those with a legitimate educational interest is a flexible standard which should achieve greater compliance with the law.

Disclosure to a School Where Student Seeks or Intends To Enroll §99.31(a)(2) (page 15,581)

The proposed regulations would allow an educational agency or institution to disclose education records, without consent, to another institution *after* a student has already

enrolled or transferred, and not just if the student seeks or intends to enroll, if the disclosure is for purposes related to the student's enrollment or transfer.

NSBA comments: NSBA supports this change. Specifically, in the commentary the Department says that in the aftermath of the Virginia Tech shooting people have questioned whether FERPA prohibits the disclosure of certain types of information from students' records to other schools. The Department indicates "any and all education records, including health and disciplinary records" may be disclosed. This is a good policy that will facilitate necessary information sharing.

However, NSBA questions the requirement that disclosures may only be made "for purposes of the student's enrollment or transfer." This language may lead schools to conclude that they cannot release education records unless the student's enrollment or transfer itself is at issue. NSBA recommends the Department define when disclosure can take place more broadly or delete the phrase "if the disclosure is for purposes of the student's enrollment or transfer."

NSBA also encourages the Department to make it clearer that any school, not just the school the student attended most recently, may share records and discuss them with the current school.

Next, in at least one state (North Carolina) a student in a public charter school can request an evaluation under IDEA from either the charter school or the "home" school district, even if the student has no intention of enrolling in the home school district. The charter school cannot release, without parent consent, records to the home school district that would be helpful in conducting the evaluation. The Department could address this problem by stating that records can be disclosed "where the student seeks or intends to enroll, or where the student is already enrolled, or from whom the student or parent has requested educational services."

Finally, the Department's commentary does not address the fact that universities and school districts probably will not change their pre-admissions records practices because disclosure may violate the student's IDEA/504 right to withhold the fact that the student has a disability. (See a March 16, 2007 Dear Colleague letter from OCR Assistant Secretary Stephanie Monroe, <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070316.html>). If pre-admission release of special education records is to be permitted, the above letter must be changed. Moreover, the FERPA regulations should specify that disclosure between a school district and a post secondary institution will not result in an inference of discrimination on the part of the receiving or sending institution. If the above letter continues to be the Department's position, then the FERPA regulations and commentary should discuss the implications of this letter to disclosing education records to post secondary institutions.

Organizations Conducting Studies for or on Behalf of an Educational Agency or Institution § 99.31(a)(6) (pages 15,581-82)

FERPA allows an educational agency or institution to disclose personally identifiable information from education records, without consent, to organizations conducting studies for or on behalf of the agency or institution for purposes of testing, student aid, and improvement of instruction. The information must be protected so that students and their parents cannot be identified by anyone other than representatives of the organization that conducts the study and must be destroyed when no longer needed for the study. Failure to destroy information in accordance with this requirement could lead to a five-year ban on disclosure of information to that organization. Current regulations restate the statutory language that the study is conducted “for, or on behalf of” the educational agency or institution, but do not explain what this language means. The proposed regulations require an educational agency or institution that discloses education records without consent to enter into a written agreement with the recipient organization that specifies the purposes of the study. The agency or institution that discloses education records under this exception does not have to agree with or endorse the conclusions or results of the study. The written agreement must specify that information from education records may only be used to meet the purposes of the study stated in the written agreement and must contain the current restrictions on redisclosure and destruction of information requirements applicable to information disclosed under this exception.

NSBA comments: While this change creates another paperwork burden for school districts, NSBA does not object to it as putting the FERPA requirements regarding use and destruction of data in writing may improve compliance. However, NSBA does not agree with the following statement in the commentary: “However, the statutory language ‘for, or on behalf of’ indicates that the disclosing agency or institution agrees with the purposes of the study and retains control over the information from education records that is disclosed.” NSBA does not think it is realistic for the school district to retain control over the information once it has been given to a third party conducting a study. In most instances, the school district will in no way involve itself in how the study is performed. Moreover, by entering into a written agreement with an organization doing the study, the obligations on the organization doing the study regarding the use and destruction of data should be clear.

USA Patriot Act § 99.31(a)(9) (page 15,582)

The USA Patriot Act amended FERPA to authorize the United States Attorney General (or designee not lower than an Assistant Attorney General) to apply for an ex parte court order (an order issued by a court without notice to an adverse party) allowing the Attorney General (or designee) to collect education records from an educational agency or institution, without the consent or knowledge of the student or parent, that are relevant to an investigation or prosecution of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism specified in 18 U.S.C. 2331. The statute requires the Attorney General (or designee not lower than an Assistant Attorney General) to certify facts in support of the order and to retain, disseminate, and use the records in a manner that is consistent with confidentiality guidelines established by the Attorney General in consultation with the Secretary of Education. Agencies and institutions are not required to record the disclosure and cannot be held liable to anyone for producing

education records in good faith in accordance with a court order issued under this provision.

The proposed regulations add new exceptions to the written consent requirement and the recordkeeping requirement allowing disclosure of education records without notice in compliance with an ex parte court order obtained by the Attorney General (or designee) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism defined in 18 U.S.C. 2331.

NSBA comments: NSBA supports this change as it appears to follow the statute.

Registered Sex Offenders § 99.31(a)(16) (pages 15,582-83)

The Campus Sex Crimes Prevention Act (CSCPA), section 1601(d) of the Victims of Trafficking and Violence Protection Act of 2000, Public Law 106-386, amended FERPA by adding 20 U.S.C. 1232g(b)(7), which provides that educational agencies and institutions may disclose information concerning registered sex offenders provided under State sex offender registration and community notification programs required by section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, 42 U.S.C. 14071. Section 170101 contains the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act).

The proposed regulations add a new exception to the consent requirement that permits an educational agency or institution to disclose information that the agency or institution received under a State community notification program about a student who is required to register as a sex offender in the State. ED states: “Note that nothing in FERPA or these proposed regulations requires or encourages an educational agency or institution to collect or maintain information about registered sex offenders.”

NSBA comments: NSBA appreciates the Department clarifying that school districts are not required or encouraged to collect or maintain this information and that disclosures are permissible and not required.

Your thoughts:

4. De-Identification of Information § 99.31(b) (pages 15,583-85)

FERPA provide that an educational agency or institution may not have a policy or practice of permitting the release of or providing access to education records, or personally identifiable information from education records, without prior written consent except in accordance with statutory exceptions. Personally identifiable information under the current regulations includes personal identifiers such as a student's name, address, and identification numbers, as well as personal characteristics or other information that would make the student's identity easily traceable.

The proposed regulations would provide objective standards under which educational agencies and institutions may release, without consent, education records, or information from education records, that has been de-identified through the removal of all personally identifiable information. Personally identifiable information would be defined to mean information that can be used to identify a student, including direct identifiers, such as the student's name, SSN, and biometric records, alone or combined with other personal or identifying information that is linked or linkable to a specific individual, including indirect identifiers such as the name of the student's parent or other family member, the student's or family's address, and the student's date and place of birth and mother's maiden name, that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstance, to identify the student with reasonable certainty.

The Department states it does not hold educational agencies and institutions responsible for knowing the status of all non-educational records about students (e.g., law enforcement or hospital records). However, the Department encourages educational agencies and institutions to be sensitive to publicly available data on students and to the cumulative effect of disclosures of student data. Additionally, personally identifiable information includes information that is requested by a person who an agency or institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates. This is known as a targeted request.

NSBA comments: NSBA has a number of comments regarding this proposed change.

First, the Department discusses a number of examples where someone asks for redacted data where it is very clear the requestor wants a specific person's records. The proposed regulations are intended to make it clear that in this instance the records may not be released. NSBA supports this change as this is a frequent problem for school districts. NSBA thinks the proposed language will be effective in accomplishing this outcome.

The Department additionally states: "Clearly, extenuating circumstances sometimes cause identity to be revealed even after all identifiers have been removed, whether in aggregated or student-level data. In these situations, the key consideration in determining whether the information is personally identifiable is whether a reasonable person in the school or its community, without personal knowledge of the relevant circumstances, would be able to identify a student with reasonable certainty."

NSBA is not sure how this standard would work and thinks that school districts would benefit from a number of examples describing how this standard would apply in real life similar to those examples the Department provided regarding targeted requests. While the targeted request examples are very helpful, most school districts know when they are receiving a targeted request and understand to decline the request it because it will reveal personally. Where school districts really need assistance is in figuring out whether non-targeted requests will reveal personally identifiable information.

An example the Department might want to use to explain its standard is as follows: X parent asks the school district for all the disciplinary records for A school for the last year. X parent explains she is thinking about moving within A school's attendance zone and wants to know more about the discipline problems at that school (so not a targeted request). In this scenario, how would the district determine whether a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstance, could identify the student with reasonable certainty?

The use of the term "community" in the standard may not be helpful. Unless the information requested is about something controversial or a school district is very small, it would seem unlikely that "a community member without personal knowledge of the relevant circumstances would be able to identify a student with reasonable certainty." If the information requested was about something controversial or the school district is very small, the request could be denied as a targeted request.

After describing the reasonable person standard in the commentary to the proposed rules the Department discusses a number of additional issues at length including releasing numerical and statistical data and using data for education research. The commentary the Department offers is general and does not appear to cover any issues specifically addressed in the language to the proposed rules. School districts do need additional guidance regarding both of these topics – particularly regarding the release of student achievement data under the No Child Left Behind Act where the "n" size of the data is small. However, NSBA believes that the guidance given in the commentary is too general and may be ignored because it is not contained in the type of document frequently read by ground level school employees and because the Department is not proposing in the regulations any specific, clear changes to how these issues must be handled. Therefore, NSBA recommends the Department promulgate informal guidance on these issues after seeking the input of major stakeholders.

5. Identification and Authentication of Identity § 99.31(c) (pages 15,585-86)

The proposed regulations would require an educational agency or institution to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records. According to ED, the proposed regulations are needed to ensure that educational agencies and institutions disclose personally identifiable information from education records only to authorized recipients.

ED is concerned about unauthorized persons receiving info like SSNs over the phone and e-mail. ED states school districts can use "any reasonable method" to authenticate identity. As discussed above in connection with controlling access to education records by school officials, ED says "methods are considered reasonable if they reduce the risk of unauthorized disclosure to a level that is commensurate with the likely threat and potential harm and depend on variety of factors, including the organization's size and resources. The greater the harm that would result from unauthorized access or disclosure, and consequently the greater the likelihood that unauthorized access or disclosure will be

attempted, the more protections an agency or institution must use to ensure that its methods are reasonable.”

ED goes on to suggest authentication using something only the user knows like in a PIN or password as long as the district ensures that it that it does not deliver a password, PIN etc. in a manner that would allow access to unauthorized recipients.

NSBA comments: NSBA does not support this change as it is an additional burden on school districts.

However, to the extent that this proposed change becomes final, NSBA agrees that school districts should be able to decide what measures are reasonable to authenticate a request. When requests for data are made via e-mail or the phone, the authentication process must vary depending on the circumstances--e.g., stating a student's first grade teacher might provide authenticity as might the details provided about the student or the school in the phone or e-mail request. Again, NSBA does not think that requiring school districts to implement a sliding scale of methods of controlling data “commensurate with the likely threat and potential harm” is realistic. School districts receive numerous demands for records each day. It would be impossible for school districts to categorize all data ahead of time by level of risk, particularly in light of the fact that certain data might be more at risk in certain people's hands.

Next, the Department suggests that giving people a PIN or something similar as a means of authentication is appropriate for disclosing certain personally identifiable information. NSBA doubts that many school districts will use PIN numbers for authentication for a number of reasons. First, this system assumes users will keep track of their PIN numbers which is doubtful. Second, few users other than parents could realistically be given PINs. For example, a school district would not want to give someone claiming to be a reporter via e-mail a PIN to access student records containing personally identifiable information. NSBA believe school districts would benefit from examples of how school districts could authenticate e-mail and phone requests, in addition to using a PIN number or something similar, like the examples NSBA describes above.

Regarding in person requests, school districts may ask for government issued photograph identification to authenticate identity. However, school districts are sometimes worried that such documents may be forged. NSBA would appreciate an explicit safe harbor provision that requiring a government issued photo identification for in person requests for data is a reasonable method of authentication.

6. Rediscovery of Education Records by Officials Listed in Sec. 99.31(a)(3) § 99.32, § 99.35 (page15,586-87)

20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5) permits an educational agency or institution to disclose education records, without prior written consent, to authorized representatives of the United States Comptroller General, the Secretary of Education, State and local

educational authorities, and the U.S. Attorney General as necessary in connection with the audit or evaluation of Federal and State supported education programs, or in connection with the enforcement of Federal legal requirements that relate to those programs. Except when the collection of personally identifiable information is specifically authorized by Federal law, personally identifiable information of parents and students may not be redisclosed to any other parties and must be destroyed when no longer needed for such audit, evaluation or enforcement purposes.

In contrast, section 1232g(b)(4)(B) contains a general prohibition on the redisclosure of information from education records. In particular, by statute an educational agency or institution may disclose personal information from education records only on the condition that the recipient will not redisclose the information to any other party without meeting the prior written consent requirement. If a recipient rediscloses personally identifiable information from education records in violation of the prior written consent requirement, the agency or institution that disclosed the records may not permit that recipient to have access to information from education records for at least five years. There is no general destruction requirement similar to the specific requirement for destruction of personally identifiable information described above for records disclosed for audit, evaluation, and enforcement purposes under section 1232g(b)(3).

Current regulation Section 99.31(a)(3) lists the four officials or authorities that may receive education records, without consent, for the specified audit, evaluation, or compliance and enforcement purposes. Section 99.35 provides that information disclosed under this exception to the consent requirement must be protected in a manner that does not permit personal identification of individuals by anyone except the officials listed in Sec. 99.31(a)(3) and must be destroyed when no longer needed for the audit, evaluation, or compliance and enforcement purposes, unless a parent or eligible student consents to the disclosure or Federal law specifically authorizes the collection of personally identifiable information. Current regulations do not specify any further conditions under which these officials or authorities may redisclose personally identifiable information from education records without prior written consent.

Current Section 99.33(c) establishes specific exceptions to the general statutory prohibition on redisclosure of information from education records under 20 U.S.C. 1232g(b)(4)(B). Section 99.33(b) also allows an educational agency or institution to disclose education records with the understanding that the recipient may make further disclosures of the information on its behalf if the disclosures could be made under Sec. 99.31 and the educational agency or institution complies with the recordkeeping requirements specified in Sec. 99.32(b). Section 99.32(a) requires an educational agency or institution to maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. If a recipient is authorized to make further disclosures of personally identifiable information from education records under Sec. 99.33(b), the educational agency or institution must record the names of the additional parties to which the receiving party may disclose the

information on behalf of the educational agency or institution and their legitimate interests under Sec. 99.31 in requesting or obtaining the information. Each student's record of disclosures is an education record that must be made available to a parent or eligible student under Sec. 99.32(c). The Department has not applied the regulatory exception in Sec. 99.33(b) to officials or authorities that receive information under Sec. 99.31(a)(3) and 99.35 because of the more specific statutory limitations, including the destruction requirement, that generally apply to these disclosures.

The proposed regulations in Sec. 99.35(b)(1) would permit officials and authorities listed in Sec. 99.31(a)(3)(i) to redisclose personally identifiable information from education records under the same conditions, set forth in Sec. 99.33(b), that apply to parties that receive personally identifiable information from education records under other exceptions in Sec. 99.31. For example, this proposed change would allow a State educational agency (SEA) to use the exception in Sec. 99.31(a)(2) to transfer a student's education records to a student's new school district on behalf of the former district. Similarly, an SEA or other official listed in Sec. 99.31(a)(3) would be able to redisclose personally identifiable information from education records received under Sec. 99.35 to an accrediting agency under Sec. 99.31(a)(7); in response to a subpoena or court order under Sec. 99.31(a)(9); or in connection with a health or safety emergency under Sec. 99.31(a)(10) and 99.36. The proposed regulations would also apply to the redisclosure of education records by an SEA (or other official listed in Sec. 99.31(a)(3)) to another listed official, such as the Secretary, for audit, evaluation, or compliance and enforcement purposes under Sec. 99.35. The regulations would also clarify that authority to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by FERPA and must be established under other Federal, State, or local law, including valid administrative regulations. Like redisclosures permitted currently under Sec. 99.33(b), redisclosures made by officials listed in Sec. 99.31(a)(3)(i) under the proposed amendment would be subject to the recordation requirements in Sec. 99.32(b).

NSBA comments: NSBA supports this change. If someone asks the authorized representatives of the United States Comptroller General, the Secretary of Education, State and local educational authorities, and the U.S. Attorney General rather than the school district for data which the school district could release if it had been asked, it would relieve the administrative burden on the school district if representatives of the United States Comptroller General, the Secretary of Education, State and local educational authorities, and the U.S. Attorney General could release the data without involving the school district.

7. Limitations on the Redisclosure of Information From Education Records § 99.33

Subpoenas and Court Orders § 99.31(a)(9) (page 15,587-88)

Basically under the current regulations, a party is allowed to redisclose personally identifiable information it received from a school district when the redisclosure is required to comply with a judicial order or lawfully issued subpoena.

The proposed regulations would require a party that has received personally identifiable information from education records from an educational agency or institution, to provide the notice to parents and eligible students, if any, before it rediscloses personally identifiable information from the records on behalf of an educational agency or institution in compliance with a judicial order or lawfully issued subpoena.

According to ED the proposed regulations are needed to clarify which party is responsible for notifying parents and eligible students before an SEA or other third party outside of the educational agency or institution complies with a judicial order or subpoena to redisclose personally identifiable information from education records.

NSBA comments: NSBA supports this change as it eases the administrative burdens on a school district when an SEA or other third party will be complying with the judicial order or lawfully issued subpoena.

8. Health and Safety Emergencies § 99.36 (pages 15,588-89)

Under the current regulations a school district may disclose personally identifiable information from education records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. School districts may include in a student's education records appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. School districts may also disclose appropriate information about these kinds of disciplinary actions to teachers and school officials within the agency or institution or in other schools who have legitimate educational interests in the behavior of the student. All of these regulatory provisions must be strictly construed.

The Department proposes to remove the language requiring strict construction of this exception and add a provision that in making a determination a school district may take into account the totality of the circumstances pertaining to a threat to the safety or health of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the school district in evaluating the circumstances and making its determination.

NSBA comments: The proposed changes to the health and safety emergency exception provide significant flexibility to school districts. NSBA offers the following questions and suggestions regarding this proposed change.

A. Under the proposed regulations, information from education records can be shared when a school district determines there is an "articulable and significant threat." This

language it assumes that a district can determine when a threat is “articulable and significant” without the assistance of others outside the district. School districts, particularly those that are small and rural districts, may not feel they have the expertise on staff (law enforcement officer or school resource officer, psychologists, and other mental health professionals) to determine whether a threat is “articulable and significant threat.” Moreover, in some threat assessments, personally identifiable information from student records would have to be revealed for the threat assessment to be exhaustive. Under the proposed regulations, outside law enforcement and mental health professionals would be excluded from the process of determining whether an “articulable and significant threat” exists if personally identifiable information must be revealed to make this determination.

Experts in the threat assessment field encourage school districts to involve persons who might not be school district employees to help make threat assessments. For example, the FBI writes in bold in *The School Shooter: A Threat Assessment Perspective*, available at <http://www.fbi.gov/publications/school/school2.pdf>: **“It is strongly recommended that a law enforcement representative should either be included as a member of the [multi-disciplinary threat assessment] team or regularly consulted as a resource person.”**

NSBA recommends that the Department change the proposed regulations to allow school districts to involve outside experts in determining whether a health and safety emergency exists. NSBA suggests the following language: “In order for the educational agency or institution to determine that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from educational records to any person or agency that is able to assist the educational agency or institution in making such determinations.”

In the alternative, if the Department believes that in all instances a reasonable school administrator could determine on his or her own when an “articulable and significant threat” exists for the purposes of determining whether records can be disclosed under the FERPA health and safety exception, NSBA asks that the Department indicate this is the case.

B. Describing the level of a health and safety emergency that would trigger disclosure is a challenging task. NSBA is concerned that “articulable and significant threat” may be too high of a standard. However, NSBA has struggled to come up with alternative language that may be better. NSBA’s biggest concern is that the standard created by the language is so high that school districts will not be able to act until a crisis is already happening. Often student behavior that raises concerns about a student’s mental health and the safety the student and others is chronic or escalating and does not necessarily pose a clear and immediate threat. At minimum, school districts would appreciate clear guidance that they can determine that a threat exists before a crisis is happening or is imminent. Likewise, NSBA asks the Department to withdraw prior guidance such as *Letter to Strayer* (March 11, 2005), in which the Department emphasizes findings of “imminent danger,” “immediate need,” and strict “temporal limitation to period of emergency” before disclosure may occur.

On a related note, the changes to the health and safety emergency were written with the events of Virginia Tech in mind. However, school districts face threats daily from students who are at risk of engaging in behaviors less dramatic than school shootings (sexual abuse, physical assaults, gang activity, etc.) that can have equally devastating consequences on individual victims. Guidance from the Department in determining when these behaviors meet the threat threshold would help schools cope with the full range of threats to the safety of its students, and facilitate the provision of services to students engaged in threatening or unsafe behavior.

C. According to the proposed regulations, information may be shared with “any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals.” NSBA recommends this language be changed so information may be shared with “any person whose knowledge of the information may be necessary to protect the health and safety of the student or other individuals.” Due to the lack of specifics, certain interventions to help someone with mental health issues, the changing nature of a threatening situation, and the possibility of learning additional information as a situation progresses, a school may not know who, exactly, needs the information to protect the health and safety of the student or other individuals. In short, school districts would appreciate additional flexibility when a threat exists to be able to err on the side of making disclosures due to the uncertain nature of these situations and the changing nature of information indicating who may be able to help.

D. NSBA supports the “totality of the circumstances” and “rationale basis” language the Department uses in the proposed regulations. NSBA encourages the Department to apply these concepts not just to school districts deciding whether a threat exists but also to school districts deciding to whom they may disclose data and what data may be disclosed. As described immediately above, who should receive what data to deal with a threat to health and safety can be different in every case. School districts would appreciate additional flexibility making difficult judgment calls based on unique situations.

E. In the context of a threat, privacy rights issues arise regarding the potential perpetrator and potential victim. Specifically can the parents of the potential perpetrator and the potential victim be told about the threat? It should be clear that when the potential perpetrator is under 18 his or her education records may be disclosed to his or her parents under FERPA regardless of the health and safety emergency exception because FERPA rights belong to the parents. Likewise, in the proposed regulations the Department has clarified that if the potential perpetrator is 18 or over, “an eligible student’s parents are appropriate parties to whom an educational agency or institution may disclose personally identifiable information from education records without consent in a health or safety emergency.” While the two above points may be clear, given the general confusion over the rights of parents under FERPA, perhaps these points should be reiterated in the commentary.

Regarding disclosure to the potential victim (if known), it would seem that in almost all instances making a disclosure to the potential victim would be appropriate under the proposed regulations. However, potential perpetrators often are surprised when information about the threat is revealed to the potential victim. For this reason, clear guidance on this point would be helpful.

F. NSBA inquires how the Department views the role of law enforcement unit records in informing law enforcement, mental health professionals, and others about possible threats. Law enforcement unit records are not protected by FERPA so information related to student threats, or any other topic, in a law enforcement unit record can be disclosed without an eligible student's consent. In other words, in theory, law enforcement unit records are a good place to record information about student threats that school districts would like to disclose to law enforcement, mental health professionals, or others.

However, a large suburban district reports to us that the law enforcement unit records its law enforcement unit has compiled are not likely to be useful in terms of making threat determinations or assessing the risk of students like the Virginia Tech shooter. In addition, because law enforcement unit records are not considered student records, they may not be protected from disclosure under most state open records laws. The ultimate result of using law enforcement unit records for the purposes of threat assessments could be less confidentiality for students. Any information from law enforcement unit records including investigations of student fights, harassment, or other student wrongdoing could easily end up in the press. Given the reality that the type of information needed for threat assessments may not "naturally" find its way to law enforcement unit records, and given the fact that information in law enforcement units may be available to the public at large, it is a good idea for school districts to try to put information related to threat assessment in law enforcement unit records?

Let's say a school district wanted to create law enforcement unit records that contain the type of information that would be useful in doing threat assessments. How would a school district go about doing this in compliance with the requirements of the law enforcement unit exception? In the K-12 setting, the law enforcement unit and the school administration are intertwined and deal mainly with disciplinary incidents that occur in the school or classroom that have disciplinary and may have police consequences. When are the records created in the course of investigating an incident student records versus law enforcement records? Most investigations begin with the assumption that the investigation is for school discipline purposes. What if the investigator uncovers information that he or she thinks is relevant to a threat assessment? Can any of the record created in the investigation be considered law enforcement unit records if their original and primary purpose was school discipline?

G. NSBA encourages the Department to work with partners like the National School Boards Association after these regulations are finalized to come up with informal guidance illustrating how the health and safety emergency exception works in real life. Such guidance might include scenarios that implicate the health and safety emergency

exception (like a bomb threat or a possible school shooting) and would describe: (1) when and how school districts could evaluate the threat; (2) when and whom school districts could share information with; and (3) what information could be shared.

9. Directory Information § 99.37

Disclosure of Directory Information About Former Students § 99.37(b) (page 15,590)

The proposed regulations clarifies that a school district must continue to honor any valid request to opt out of directory information disclosures made while the individual was a student unless the parent or eligible student rescinds the decision to opt out of directory information disclosures.

According to ED school districts have been confused about whether they must continue to honor a parent's or eligible student's decision to opt out of directory information disclosures once the student no longer attends the institution. The regulations clarify that while a school district does not have to notify former students about its policy on directory information disclosures and their right to opt out, directory information may not be disclosed once an individual is no longer a student if the individual made a valid request to opt out while a student in attendance and has not rescinded that request.

NSBA comment: NSBA does not object to this proposed change. However, practically speaking, school district computer systems (particularly older systems) may not always have the ability to identify an opt out status with old records. For this reason, school districts might require employers to obtain written consent from former students before releasing information about students. This process may annoy alumni who want employers to be able to receive information about their secondary school attendance promptly and without red tape.

Identification of Students and Communications in Class § 99.37(c) (page 15,590)

The proposed regulations would provide that a parent or eligible student may not use their right to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, electronic identifier, or institutional e-mail address in a class in which the student is enrolled. According to ED, several institutions have asked whether a teacher can include in a classroom roll call or sign-in sheet the names of students who have opted out of directory information disclosures. They have also asked whether a student's e-mail address may be disclosed to other students in an on-line class if the student has opted out of directory information disclosures.

NSBA comments: NSBA supports this common sense clarification.

Prohibition on Use of SSNs To Identify Students When Disclosing or Confirming Directory Information § 99.37(d) (pages 15,590-91)

The proposed regulations would prohibit an educational agency or institution from using an SSN, either alone or when combined with other data elements, to identify or help identify a student or the student's records when disclosing or confirming directory information unless the student has provided written consent. According to ED, some institutions, along with vendors that provide services on behalf of institutions, allow employers and others who seek directory information about a student, such as whether a student has ever attended the institution or received a degree, to submit the student's SSN as a means of identifying the individual. ED states that use of an SSN to identify a student or the student's records constitutes an implicit confirmation of the SSN, even if several other data elements are also used to help identify the student in the process.

NSBA comments: NSBA does not object to this change as a matter of policy because of the usefulness of SSNs in identity theft. However, NSBA notes the lack of statutory basis for this proposed change.

10. Enforcement (§§ 99.62, 99.64, 99.65, 99.66, and 99.67)

Complaint and Investigation Procedure § 99.64 (pages 15,591)

The current regulations provide that a complaint must contain specific allegations of fact that an educational agency or institution has violated FERPA and that FPCO investigates each timely complaint to determine whether a violation occurred.

The proposed regulations provide that a complaint does not have to allege that a violation or failure to comply with FERPA is based on a policy or practice of the agency or institution. If the Office determines that the agency or institution has violated or failed to comply with a FERPA requirement, the Office may also seek to determine whether the violation or failure to comply was based on a policy or practice of the agency or institution. In addition, the Office may investigate a possible FERPA violation even if it has not received a timely complaint from a parent or student or if a valid complaint is subsequently withdrawn.

ED wants to make it clear that FPCO has authority to investigate possible FERPA violations even if no complaint has been filed or a complaint has been withdrawn; that FPCO can investigate allegations of non-compliance provided by a school official or some other party who is not a parent or eligible student; and that FPCO investigate a FERPA complaint even if the party has not specifically alleged that the agency or institution has a policy or practice in violation of FERPA.

NSBA comments: NSBA opposes these proposed changes. NSBA notes that FPCO has limited resources to investigate non-compliance with FERPA. NSBA believes FPCO's resources would be better spent focusing where there appears to be actual, significant problems with noncompliance. The criterion under the current regulations is a good indicator of actual, significant non-compliance: specific allegations of fact that a school district has violated FERPA. Where no complaint has been made or a complaint has been withdrawn, where the complaint is made by someone without FERPA rights, or

where the complaint is not based on a policy or practice, the likelihood of an actual significant violation is not very high.

Enforcement Responsibilities of the Office § 99.66 (pages 15,591-92)

FERPA provides that no funds shall be made available under any program administered by the Secretary to an educational agency or institution or an SEA that has a policy of denying or effectively prevents parents from exercising their right to inspect and review the student's education records. FERPA also provides that no funds shall be made available under any program administered by the Secretary to an educational agency or institution unless parents are provided an opportunity for a hearing to challenge the content of the student's education records under specified conditions. FERPA further provides that no funds shall be made available under any program administered by the Secretary to an educational agency or institution that has a policy or practice of permitting the release of, releasing, or providing access to personally identifiable information in education records without prior written consent except as authorized under FERPA. FERPA directs the Secretary to take appropriate actions to enforce and deal with FERPA violations, except that action to terminate assistance may be taken only if the Secretary finds that there has been a failure to comply and that compliance cannot be secured by voluntary means. The statute does not specify what steps the Secretary should take to conduct investigations and seek voluntary compliance.

The proposed regulations would allow FPCO to issue a notice of findings that an educational agency or institution violated FERPA without also finding that the violation constituted a policy or practice of the agency or institution.

NSBA comments: NSBA opposes this change. A review of the FERPA statute, as the Supreme Court pointed out in Gonzaga University v. Doe, 536 U.S. 273 (2002), reveals that Congress used the terms “policy” or “policy or practice” when describing the FERPA violations that would result in a loss of funds. In short, the plain language of the FERPA statute limits the instances in which Congress wants FPCO to take enforcement actions against school districts to violations of “policy” or “policy or practice.” The interpretation that FPCO may issue a notice of findings that an educational agency or institution violated FERPA without also finding that the violation constituted a policy or practice of the agency or institution is without support in the FERPA statute.

Enforcement Actions § 99.67 (page 15,592)

As described above, FERPA provides that “no funds shall be made available” if a variety of violations occur. FERPA directs the Secretary to take appropriate actions to enforce and deal with FERPA violations, except that action to terminate assistance may be taken only if the Secretary finds that there has been a failure to comply and that compliance cannot be secured by voluntary means. The statute does not specify what steps the Secretary should take to conduct investigations and seek voluntary compliance or what enforcement actions the Secretary may take in cases of non-compliance.

Under the current regulations, the Secretary may withhold further payments, issue a complaint to compel compliance through a cease and desist order, or terminate eligibility to receive funding under any applicable program only if an educational agency or institution fails to comply voluntarily with FERPA.

Under the proposed regulations, the Secretary may take enforcement actions if the Office determines that the educational agency or institution has a policy or practice in violation of FERPA requirements and has failed to come into compliance voluntarily. The proposed regulations also clarify that the Secretary may take any other appropriate enforcement action in addition to those listed specifically in the regulations.

According to ED, the proposed regulations are needed to clarify that FPCO may issue a notice of violation or failure to comply with specific FERPA requirements, such as a single failure to provide a parent with access to education records, and require corrective action. However, the Office may not seek to withhold payments, terminate eligibility for funding, or take other enforcement actions unless the Office determines that the agency or institution has a policy or practice in violation of FERPA requirements. The proposed regulations are also needed to clarify that the Secretary may take any other enforcement action that is legally available, such as entering into a compliance agreement under 20 U.S.C. 1234f or seeking an injunction.

NSBA comments: Again, for the reasons described immediately above, NSBA does not agree that FPCO may issue a notice of violation or failure to comply with specific FERPA requirements, such as a single failure to provide a parent with access to education records, and require corrective action. However, NSBA does support the clarification that FPCO may not seek to withhold payments, terminate eligibility for funding, or take other enforcement actions unless the FPCO determines that the agency or institution has a policy or practice in violation of FERPA requirements.

Please consider these comments when adopting final rules.

Respectively submitted,

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